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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re GUSTAVO ALDERETTE, on Habeas Corpus.	B225109 (Los Angeles County Super. Ct. No. BH006394)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter Paul Espinoza, Judge. Reversed.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Phillip Lindsay, Amy M. Roebuck and Michael Rhoads, Deputy Attorneys General, for Appellant Attorney General.

Picone & DeFilippis and Steve M. DeFilippis, under appointment by the Court of Appeal, for Petitioner.

Petitioner Gustavo Alderette is serving concurrent indeterminate life terms for two murder convictions. The Board of Parole Hearings (Board) found Alderette suitable for parole on November 4, 2008, but Governor Arnold Schwarzenegger reversed the Board's decision, determining that Alderette's release would pose an unreasonable risk of danger to society. The superior court granted Alderette's habeas corpus petition, finding the Governor's assessment of the risk of future dangerousness lacked any evidentiary support. As we explain, the order granting habeas corpus relief must be reversed.

Our Supreme Court mandates that we apply a highly deferential standard of review, limited to ascertaining whether there is *some evidence* in the record that supports the Governor's decision in a manner reflecting due consideration of the requisite statutory factors. We have no legal authority to reweigh the evidence, much less make an independent assessment of a prisoner's suitability for parole. Here, the Governor's finding was supported by cognizable evidence that, among other things, (1) Alderette committed two cold-blooded murders over the course of two years, in which he was one of the leaders; (2) the murders were the culmination of a long criminal history of increasingly serious offenses; and (3) he had received a recent psychological evaluation that indicated he posed a moderate risk of committing a violent offense if released, based on a diagnosis of antisocial personality disorder and a finding that he was placed in the moderate to high range for psychopathy.

PROCEDURAL HISTORY

On August 25, 1988, Alderette entered a guilty plea to second degree murder and the personal weapon use allegation as to the killing of David Diamond on October 5, 1985. On December 4, 1989, he pled guilty to the February 20, 1987 second degree murder of Michael Apardian. He was sentenced to 16 years to life for the Diamond murder and a concurrent term of 15 years to life for the Apardian murder. He began serving those terms on December 20, 1989, with a minimum eligibility for parole date of May 21, 1998.

On November 4, 2008, the Board conducted a hearing on Alderette's suitability for parole, in which it determined that parole should be granted. On April 1, 2009, the Governor issued his Indeterminate Sentence Parole Release Review, reversing that decision. Alderette filed his habeas corpus petition on September 28, 2009, in superior court. The court granted that petition in an order issued on May 21, 2010. The timely appeal followed.

FACTS BEFORE THE BOARD AND GOVERNOR

The facts concerning Alderette's criminal history and commitment offenses were not disputed. After numerous arrests,[1] his first sustained juvenile petition occurred in 1979 when he was 15 years old for possession of a sawed-off shotgun, carrying a concealed weapon, and battery. Alderette admitted that his criminal activities were gang related. At 16, he had sustained petitions for sale of marijuana and battery of a juvenile hall staff member. At 17, he had a sustained petition for battery (having beaten two women, one of whom suffered a broken rib from his punches and kicks), and for marijuana cultivation. As an adult, he was convicted of attempted extortion in 1983, along with assault by means of force likely to produce great bodily harm in 1984—a gang-related attack in which the victim was beaten, kicked, and knifed.

Alderette committed the Diamond murder while on probation for the 1984 assault. Diamond, a drug-dealer, had threatened Michael Flores. On October 5, 1985, Diamond and his girlfriend arrived at Flores's residence to apologize, having brought a propitiatory six-pack of beer. Flores was not there, but Alderette and two friends were. An argument ensued while they all waited for Flores. Alderette punched Diamond, and his friends joined in the beating. Diamond screamed, and his girlfriend begged them to stop.

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[1] Alderette's first arrest was at age 12. At 15, he was arrested for possessing a knife on school grounds and battery in a gang-related incident. The petition was dismissed, but he was "suspended from school for a couple weeks."

Alderette did so, but only for the purpose of retrieving a knife from the kitchen. He returned to stab Diamond multiple times, while one of his friends held the victim down.

The Apardian murder arose out of a scheme in which Alderette, Abraham Eykjian, Joe Sanchez, Apardian, and two others—Hector Estrada and David Madders—robbed a jewelry store in downtown Los Angeles in February 1987.[2] A dispute subsequently arose among the robbers as to whether Estrada and Madders had stolen cash from them. Estrada convinced Alderette and Sanchez of his innocence of the theft, offering to "prove" himself by killing his accuser, Apardian. With Alderette's assistance, Sanchez and Estrada tied Apardian up, Estrada stabbed him to death, and they all stole Apardian's jewelry, before using a car belonging to Alderette's girlfriend to dispose of the body.

As the Board found, Alderette's conduct and rehabilitative efforts in prison were highly commendable. Having entered prison as a high school graduate, he took 39 units of college courses and completed vocational training in dry cleaning, shoe repair, and welding. While in prison, he also became certified as a customer service specialist. Alderette worked in numerous skilled institutional jobs, as well as several clerk positions. In addition, he participated in a wide array of self-help and therapy programs in alcohol and substance abuse, anger management, Bible studies, parenting, peer counseling, and victim awareness. He also served as a literacy tutor and participated in a charitable program to provide recreational aid to needy inmates.

The Board also considered various psychological evaluations. In 2003, Dr. Joe Livingston found Alderette scored in the "low end of the moderate range" for psychopathy. By objective testing instruments, "the indication was unequivocal for this subject, there is a moderate risk for future violence i[n] the free community." The results were similar to those of Dr. Garrett Essres in 2000. Dr. Livingston explained that the "moderate risk outcome" was due to Alderette's "static risk factors"—primarily, his criminal history—which would not change. However, "this examiner suggests that this

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[2] Alderette, Sanchez, and Eykjian took part in a failed robbery of a different jewelry store on December 30, 1986, in which Sanchez brandished a handgun and struck a victim with it before they fled.

should not be interpreted as a mere statistical artifact, but rather a true representation of the probability of risk for future violence" because a history of violence is empirically predictive of future violence. The evaluator, nevertheless, expressed "neither support or non-support for parole." A 2006 evaluation by Dr. Maryann Davis agreed with the moderate risk assessment.

Dr. Teresa George conducted her evaluation on October 12, 2007. She diagnosed Alderette with antisocial personality disorder, based on antisocial behaviors and crimes beginning at the age of 12 (his first arrest) and his escalating criminal history, which was "undeterred by legal sanctions." Additionally, throughout the interview itself, Alderette "presented in a grandiose and glib manner." Although he had not been cited for any rules violations, "the inmate has been removed from two institutional programs due to his disregard of institutional policies." His scores on the psychopathy assessment were in the moderately high range, but were not "definitive" for that diagnosis. Alderette's scores "reflect[ed] a chronically unstable, antisocial and socially deviant lifestyle" and he "exhibit[ed] psychopathic traits such as impulsivity, shallow affect and poor behavioral control."

Like Drs. Essres, Livingston, and Davis, Dr. George found Alderette's scores in the assessment of risk of future violence to be in the moderate range. "The inmate attained scores that would suggest that his risk for future violence would be significant." Dr. George expressed concern that Alderette had minimized his substance abuse history and, despite his excellent work history in prison, continued to "struggle to follow institutional policy as indicated by recent removals from both work and self-help activities"—incidents for which he did not take responsibility. Further contributing to Dr. George's moderate risk assessment, was her perception that Alderette's expressions of remorse for his murders were "superficial at best." Her evaluation was reviewed by Dr. Jasmine Tehrani, the Board's senior psychologist and supervisor.

The Board also considered a psychological evaluation by Dr. Melvin Macomber, who had been retained by Alderette. Dr. Macomber conducted his evaluation interview on October 9, 2007, and issued his report three days later. As the Board explained, Dr.

Macomber found Alderette to be "free from any mental or emotional problems that would interfere with his future parole planning," with an excellent prognosis for successful adjustment in the community. The Board also considered Dr. Macomber's subsequent written review of Dr. George's evaluation. In that document, dated November 3, 2007, Dr. Macomber severely criticized his colleague's methodology and assessment, concluding that her evaluation "should not be made a part of Mr. Alderette's official record" because of her "gross inaccuracies."

According to Dr. Macomber, the evaluation by Dr. George systematically focused on Alderette's criminal history, while overlooking "all of the positive, life changing, growth factors." For instance, Dr. Macomber asserted the antisocial personality disorder diagnosis was unsound because Dr. George failed to conduct tests to assess the presence of the disorder currently—tests which he conducted and obtained results "indicating that this is no longer an issue in his life." With regard to Dr. George's reference to recent incidents in which Alderette had to be removed from prison activities, he concluded that Alderette's solicitous and well-meaning actions were misinterpreted by prison officials and uncritically accepted by Dr. George.

Regarding Alderette's plans for release on parole, the Board and the Governor referred to representations that the inmate planned to live with his ex-wife in Los Angeles, where he had been offered employment as an automotive detailer.

The Board's Decision

In making its parole suitability determination, the Board found the commitment offenses showed "vicious, callous, dispassionate, typical gang mentality," in which Alderette admitted "taking a leadership role within the gang and pretty much controlling things." The Apardian murder amounted to "typical criminal behavior, vicious, nasty, gang type behavior." From the age of 12 up to the time of commitment, Alderette had a record of significantly escalating violent criminal behavior. Nevertheless, since his commitment, Alderette adjusted well and took advantage of rehabilitative opportunities

within a year of imprisonment. He had no disciplinary record, along with an excellent work history and educational ethic. Alderette demonstrated that he had gained insight into his problems through self-help programs and showed remorse for his crimes.

The Board discussed the psychological reports by Drs. Livingston and George. One commissioner noted that despite the moderate risk of future violence assessments, he believed Alderette's fine disciplinary record indicated that he was "a changed man." The presiding commissioner agreed and pointed to Alderette's "good, solid plans" for work and residency upon release.

The Governor's Reversal

The Governor's extensive written review fairly recounted Alderette's criminal history, including the commitment offenses. He also detailed Alderette's extensive rehabilitative efforts, noting the college credits he earned, the technical skills he obtained, the self-help and therapy programs he completed, along with his other "positive factors," including "positive remarks from various mental health professionals over the years." The Governor was also aware of Alderette's residency and employment plans.

Weighing against the positive factors, however, were the circumstances of the commitment offenses. The Governor endorsed the Board's findings as to the "horrifying" nature of the Apardian murder, the fact that Alderette had killed more than one person, and that he had done so in a cold and callous manner, showing "no compunctions about committing murder." Additionally, the Governor pointed to the findings in Dr. George's 2007 psychological evaluation, including his current superficial expression of remorse, glib presentation, and lack of insight, along with the evaluator's diagnosis of antisocial personality disorder—all of which contributed to Dr. George's assessment that Alderette posed a moderate likelihood of committing violent offenses if released.

The Governor concluded that the gravity of the commitment offenses, together with Dr. George's 2007 mental health evaluation, indicated that Alderette's release would

pose an unreasonable risk to public safety. He noted the District Attorney's agreement in that assessment.[3] Despite having "made some creditable gains in prison," the Governor believed Alderette's release at this time posed an unreasonable danger to society.

The Superior Court's Grant of Habeas Relief

In granting Alderette's habeas corpus petition, the lower court summarized his criminal history and commitment offenses, lack of prison disciplinary record, various psychological evaluations from 2006 and 2007, and Alderette's residency and employment plans. The court found the Governor's determination lacked any evidence that Alderette posed a present risk of future violence, however, because the Governor's reliance on Dr. George's evaluation was "improper." According to the court, the Governor ignored the other 2007 evaluation (by Dr. Macomber), while focusing entirely on the supposedly outdated report by Dr. George, which it found had been invalidated by Dr. Macomber's report of November 3, 2007.

DISCUSSION

Alderette's argument on appeal and the superior court's ruling suffer from the same infirmity—they misapply the mandated standard of legal review and improperly reweigh the evidence before the Board and the Governor.

"Although 'the Governor's decision must be based upon the same factors that restrict the Board in rendering its parole decision' [citation], the Governor undertakes an

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3 Alderette asserts the district attorney was proscribed from taking a position because it had promised either support or non-opposition as part of an agreement when Alderette agreed to testify against a prison gang member while incarcerated. At the hearing, the deputy district attorney acknowledged Alderette's helpful testimony in that regard, but represented that no such promise had been made. Rather, the prosecutor's office had promised only to inform the Board of Alderette's assistance in prosecuting the gang member.

independent, de novo review of the inmate's suitability for parole. [Citation.] Thus, the Governor has discretion to be 'more stringent or cautious' in determining whether a defendant poses an unreasonable risk to public safety. [Citation.] '[T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor . . . . It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the Governor's decision reflects *due consideration of the specified factors* as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision.'" (*In re Lawrence* (2008) 44 Cal.4th 1181, 1204 (*Lawrence*), quoting *In re Rosenkrantz* (2002) 24 Cal.4th 616, 677 (*Rosenkrantz*).)

The touchstone of the Governor's (and the Board's) suitability determination is whether the prisoner poses a current risk of danger to the public. To the extent Alderette argues his positive rehabilitative efforts in prison have rendered immaterial his commitment offenses as suitability considerations, he is mistaken. "[T]he Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety." (*Lawrence, supra,* 44 Cal.4th at p. 1221.) That is, "the circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative of the determination that a prisoner remains a danger to the public. It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*Id.* at p. 1212.)

Here, contrary to Alderette's assertions and the superior court's findings, the Governor explained why Alderette's criminal history and commitment offenses contributed to a finding of current dangerousness, based on a recent psychological

evaluation that diagnosed him with antisocial personality disorder and placed the inmate at a moderate risk of future violence. Our Supreme Court's recent decision in *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), is determinative. In that case, the high court found the Governor's future dangerousness conclusion was supported by some evidence, where it was based almost exclusively on the inmate's commitment offense (the second degree murder of his wife) and his long history of domestic violence. "The record supports the Governor's determination that the crime was especially aggravated *and*, importantly, that the aggravated nature of the offense indicates that petitioner poses a current risk to public safety." (*Id.* at p. 1259.)

As the *Shaputis* court explained: "This is not a case, like *Lawrence, supra,* 44 Cal.4th [at page] 1225, in which the commitment offense was an isolated incident, committed while petitioner was subject to emotional stress that was unusual or unlikely to recur. (See, e.g., [Cal. Code Regs., tit. 15,] § 2402, subd. (d)(4) [the circumstance that the crime was committed during a period of significant stress in an inmate's life constitutes evidence to be considered in evaluating his or her suitability for parole].) Instead, the murder was the culmination of many years of petitioner's violent and brutalizing behavior toward the victim, his children, and his previous wife." (*Ibid.*)

Similarly, Alderette's criminal history showed increasingly serious violent crimes from an early age to the two commitment offenses. Indeed, the nature of that history and the two murders made the prospect of future violent acts arguably greater than in *Shaputis*. Not only did Alderette commit two murders, but his crimes were not acts of domestic violence, but were directed to the public at large. His first victim was a stranger and the second was a coconspirator in his robbery scheme. Additionally, as was undisputed, both of Alderette's murders were unprovoked and were the product of cold-blooded, ruthless consideration. Alderette's resort to crime was not aberrational, but rather flowed directly from his precommitment lifestyle.

Moreover, in *Shaputis*, the Governor did not rely on a current psychological report. There, the reports indicated that the inmate was a low risk of future violence, as long as he remained sober. (*Shaputis*, *supra*, 44 Cal.4th at pp. 1249-1251.) In contrast,

Dr. George's 2007 report explained in detail, based on historical and current factors, why Alderette posed a moderate risk of future violence. As such, Alderette's case is easily distinguished from that in *Lawrence*, "in which evidence of the inmate's rehabilitation and suitability for parole under the governing statutes and regulations is overwhelming, the only evidence related to unsuitability is the gravity of the commitment offense, and that offense is both temporally remote and mitigated by circumstances indicating the conduct is unlikely to recur . . . ." (*Lawrence, supra*, 44 Cal.4th at p. 1191.) It should be noted that in *Lawrence*, "five psychologists conducting 12 separate evaluations since 1993 concluded that petitioner no longer represented a significant danger to public safety." (*Id.* at p. 1195.) Here, psychological testing in 2000, 2003, 2006, and 2007, by four mental health examiners, placed Alderette in the moderate range for risk of future dangerousness. Only Dr. Macomber, in his 2007 evaluation, found the risk of danger to be minimal.

In finding the Governor improperly relied on Dr. George's evaluation and ignored that of Dr. Macomber, the superior court erroneously engaged in reweighing the evidence before the Board and the Governor. There can be no serious doubt that "'the Governor . . . has broad discretion to disagree with his State's forensic psychologists.'" (*In re Rozzo* (2009) 172 Cal.App.4th 40, 62.) It necessarily follows that his discretion is just as broad in assessing which psychological report to find most persuasive.

Nor is the superior court correct in finding that the Governor "ignor[ed] positive sentiments expressed in more recent reports." That finding appears to derive from the fact that the Governor's statement did not detail the conclusions in Dr. Macomber's evaluation. Not only is such an assessment inconsistent with the deferential standard of review we must apply, but the Governor's written review plainly stated that he considered the "positive remarks from various mental health professionals over the years." Further, the evidence does not support the lower court's finding that Dr. George's evaluation was so outdated in light of Dr. Macomber's November 3, 2007 review that the former could not be considered "some evidence." As we have shown, the evaluations by Drs. Macomber and George were essentially contemporaneous, both

having occurred in October 2007—and the latter's finding of a moderate risk of future dangerousness was consistent with every other mental health evaluation in the record, save Dr. Macomber's. This is nothing like the situation in *Lawrence*, where "the positive psychological assessments of petitioner in every evaluation conducted during the last 15 years have undermined the evidentiary value of these dated reports setting forth stale psychological assessments." (*Lawrence, supra,* 44 Cal.4th at pp. 1223-1224.)

The superior court's finding that Dr. Macomber's report of November 3, 2007, "invalidates" Dr. George's evaluation similarly amounts to an improper credibility determination between competing mental health opinions. As we have pointed out, that November report merely set forth Dr. Macomber's negative assessment of his colleague's methodology and conclusions, based on contemporaneous evaluations conducted only weeks before. Significantly, in seeking to portray Dr. George's evaluation as so unsound as to amount to non-evidence, the superior court overlooks the response from Dr. Tehrani, the Board's senior psychologist. Dr. Tehrani stated that, having reviewed Dr. Macomber's report, "it remains [her] clinical opinion that the report [by Dr. George] is objective and data[-]based and merits consideration for the parole hearing. The opinions and conclusions are empirically valid and flow directly from the data. The logic and reasoning are sound."[4] Thus, the question of which report to credit is one that we, as judicial officers, are proscribed from resolving. "Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor." (*Rosenkrantz, supra,* 29 Cal.4th at p. 677; see also *id.* at p. 679 ["As we have explained, the applicable standard of review is extremely deferential to the Governor's decision, and our inquiry strictly is limited to whether some evidence supports the

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[4] To the extent Alderette and the superior court relied on Dr. Tehrani's response, it was only for her statement that Dr. Davis's evaluation in 2006 remained valid; however, that prior report also concluded that Alderette was a moderate risk for future violence. Moreover, as we have shown, Dr. Livingston's 2003 report, while remaining neutral on his assessment of future dangerousness, made it clear that the test results indicative of a "moderate risk outcome" based on "static" historical factors was methodologically sound.

Governor's assessment of the circumstances of petitioner's crime—not whether the weight of the evidence conflicts with that assessment or demonstrates that petitioner committed the offense because of extreme stress"].)

DISPOSITION

The superior court's order granting Alderette's petition for habeas corpus is reversed.

KRIEGLER, J.

I concur:

TURNER, P. J.

MOSK, J., Concurring,

I concur only because Mr. Alderette's crimes, criminal background, and Dr. George's report fulfill the "some evidence" requirement. However one views Dr. George's report, it is part of the record.

Parole Board Commissioner stated, "'Mr. Alderette, you are a very, very strange case. I don't know if I've ever seen one like this, maybe once. You know, on the outside, you're involved with some stuff that got you here. And all of a sudden, I mean, we didn't have a gradual metamorphosis, so to speak. First year, second year. This thing started as soon as you got in prison. Not a single 115, not a single 128, and we know how hard that is. . . . I've just never seen a turnaround like this. Really haven't. Not from day one. And I just want to commend you for that. I don't know what happened to you.'"

Mr. Alderette has received laudatory comments from law enforcement. He has participated in self help and other organizations, and he has contributed to various programs. He has completed education programs and pursued a degree at Hartnell College. He has remained entirely disciplinary free, never having received a CDC 115 or even a 128A minor non-disciplinary write-up, throughout his entire incarceration.

In short, it appears he has done everything one can do to try to rehabilitate himself and to attempt to demonstrate that he is no longer a danger to society. The trial court's opinion certainly is not unreasonable, even if we come to a different conclusion. Undoubtedly the issue of Mr. Alderette's parole will be back before the Parole Board and Governor for further consideration.

MOSK, J.